

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

and

1199 SEIU UNITED HEALTHCARE WORKERS EAST, N.J. REGION

Intervenor

V.

NEW VISTA NURSING AND REHABILITATION

Respondent/Cross-Petitioner

Nos. 11-3440
12-1027
12-1936

Board Case:
22-CA-29988

STATUS REPORT OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Third Circuit:

The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, provides this status report pursuant to the Court’s December 4, 2015 order. Following the Court’s remand of the administrative record to the Board on December 4, and consistent with the terms of the remand, the Board considered three motions for reconsideration filed by New Vista Nursing and Rehabilitation (“the Company”) in 2012. Those motions, as indicated in earlier

filings in this case, were previously ruled on by Board panels that included invalidly appointed Board members.

On December 17, 2015, a properly constituted Board panel, consisting of Members Miscimarra, Hirozawa, and McFerran, issued an order addressing and denying the Company's 2012 motions. (See Exhibit A.) The following day, the Company moved for reconsideration, challenging Member Hirozawa's participation in the issuance of the order and calling for his recusal. (See Exhibit B.)

The Company's most recent motion for reconsideration is pending before the Board at this time.

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, D.C.
this 4th day of January 2016

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**NEW VISTA NURSING AND
REHABILITATION, LLC**

and

Case 22-CA-029988

**1199 SEIU UNITED HEALTHCARE
WORKERS EAST, NJ REGION**

ORDER DENYING MOTIONS FOR RECONSIDERATION

On August 26, 2011, the Board issued a Decision and Order in this proceeding granting the Acting General Counsel's Motion for Summary Judgment and, inter alia, ordering the Respondent, on request, to bargain with 1199 SEIU United Healthcare Workers East, NJ Region as the certified collective bargaining representative of its unit employees. 357 NLRB No. 69.

On September 9, 2011, the Respondent filed a motion for reconsideration of the Board's August 26 Decision and Order. The Respondent advanced two arguments in support of its motion. First, the Respondent asserted that because the above-referenced Decision and Order was postmarked August 31, 2011, the decision issued after then-Chairman Wilma B. Liebman's departure from the Board on August 27, 2011, and is therefore void as ultra vires. Second, the Respondent argued that the Board erred in failing to order a hearing on its contentions that it changed the duties of unit employees after the Regional Director issued his Decision and Direction of Election finding that those employees are not supervisors, and that those changes establish that the employees currently possess supervisory authority and the unit is now inappropriate.

On December 30, 2011, the Board issued an Order rejecting the Respondent's motion for reconsideration.¹ With regard to the date the underlying decision was issued, the Board explained that the date of the decision reflected the date on which all participating members had voted on the final draft, and that the later reproduction, mailing, and uploading of the decision to the Board's website were purely ministerial functions that did not affect the date on which the Decision and Order issued. With regard to the alleged changes in the duties of unit employees, the Board rejected the Respondent's contentions for the reasons set forth in the Board's August 26, 2011 Decision and Order.

On January 3, March 14, and March 22, 2012, respectively, the Respondent filed its second, third and fourth motions for reconsideration. In its second motion for reconsideration the Respondent argued that the December 30, 2011 Order denying its first motion for reconsideration was improper because it issued without the participation of a quorum, as Chairman Pearce, who was a member of the panel together with then-Members Craig Becker and Brian E. Hayes, was recused. By order dated March 15, 2012, the Board denied the Respondent's second motion for reconsideration, finding that the December 30, 2011 Order was properly issued.

In its third motion for reconsideration, the Respondent argued that the December 30, 2011 order denying its first motion for reconsideration was invalid because the recess appointment of Member Becker, who participated in that decision, had expired prior to that date. While the Board was considering the third motion for reconsideration, the Respondent filed its fourth motion for reconsideration reiterating the argument from its third motion for reconsideration and asserting in the alternative that the March 15 denial of its

¹ Chairman Mark Gaston Pearce, who was recused and did not participate in the underlying decision, was a member of the panel but did not participate in deciding the merits of the motion for reconsideration.

second motion for reconsideration was improper because the recess appointments of then-Members Griffin and Block, who participated in that decision, were invalid. By order dated March 27, 2012, the Board denied the Respondent's third and fourth motions for reconsideration.

On September 14, 2011, while the first motion for reconsideration was pending, the Board filed its application for enforcement in the United States Court of Appeals for the Third Circuit.² Thereafter, the Respondent filed its cross-petitions for review.

At the time of the orders denying the Respondent's second, third and fourth motions for reconsideration, the composition of the Board included three persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid.

By letter dated November 19, 2015, the United States Court of Appeals for the Third Circuit requested that the parties be prepared to address the following questions at oral argument:

- 1) For purposes of our jurisdiction under section 10(e) of the NLRA, what effect, if any, do pending motions for administrative reconsideration have on the finality of the order for which the NLRB seeks enforcement?
- 2) If the NLRB lacked a proper quorum at the time it filed the administrative record with the Court, why aren't we required, under section 10(e) of the NLRA, to remand the record to the NLRB so that it can take action via a properly constituted quorum?

² This is consistent with Sec. 102.48(d)(3) of the Board's Rules and Regulations, which provides:

The filing and pendency of a motion [for reconsideration] under this provision shall not operate to stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

- 3) In light of *New Process Steel, L.P. v. NLRB*, 560 US 674 (2010) and *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), would remanding this case so that the NLRB may take action with a properly constituted quorum be the most efficient approach?

On December 2, 2015, in light of *NLRB v. Noel Canning* and the Court's questions referenced above, the Board filed a motion for limited remand of the administrative record to allow the current Board to address the Respondent's second, third and fourth motions for reconsideration. On December 4, 2015, the Court granted the Board's motion to remand.³

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.⁴

In its second motion for reconsideration, the Respondent contends that the Board's December 30, 2011 Order was improper because it issued without the participation of a quorum, as Chairman Pearce, who was a member of the panel together with then-Members Craig Becker and Brian E. Hayes, was recused. At footnote 2 of the Board's December 30, 2011 Order, the Board stated:

Chairman Pearce, who is recused and did not participate in the underlying decision, is a member of the present panel but did not participate in deciding the merits of this proceeding.

In *New Process Steel v. NLRB*, __ U.S. __, 130 S. Ct. 2635 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum when one of the panel members has recused himself. Under the Court's reading of the Act, "the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 130 S. Ct. at 2644; see also *Correctional Medical Services*, 356 NLRB No. 48, slip op. at 1 fn. 1 (2010).

³ The Court denied the Board's additional request that the time period of the remand be limited to 30 days. Per Sec. 10(c) of the National Labor Relations Act, the Court retained jurisdiction over this matter.

⁴ Chairman Pearce is recused and did not participate in the consideration of this matter.

Having duly considered the matter, the Respondent's second motion is denied. We find that our December 30, 2011 Order was properly issued, for the reasons stated therein.

In its third motion for reconsideration, the Respondent argues that the December 30, 2011 order denying its first motion for reconsideration was invalid because the recess appointment of Member Becker, who participated in that decision, had expired prior to that date.

Having duly considered the matter, the Respondent's third motion for reconsideration is denied. As the Court's decision in *Noel Canning* makes clear, a Senate session ends when the Senate adjourns *sine die*. Because the Senate did not adjourn *sine die* before December 30, 2011, Member Becker's term did not end prior to the Board's issuance of the December 30, 2011 order. In fact, his term extended to January 3, 2012, when one Senate session ended and the next session began. *Entergy Mississippi, Inc.*, 361 NLRB No. 89 (2014).

Finally, in view of our above disposition of the Respondent's second and third motions for reconsideration, the Respondent's fourth motion for reconsideration is denied as moot.

Dated, Washington, D.C., December 17, 2015

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

Law Office of
MORRIS TUCHMAN

134 Lexington Avenue, New York, New York 10016 - Telephone (212) 213-8899
Telefax (212) 213-6308

Morris Tuchman*
J. Ari Weiss*

Correspondence to New York

*Admitted Connecticut, New York

Long Island Office
35 Dune Road
Westhampton Beach, New York 11978

December 18, 2015

Office of Executive Secretary
National Labor Relations Board
By Electronic Mail only

Re: New Vista Nursing and Rehabilitation 22-CA-29988
Motion for reconsideration

May it please the Board:

Please be advised that the undersigned represents the Respondent in the above referenced matter. This motion seeks reconsideration of the Board's order dated December 17, 2015.

As the Board's order reflects, this matter was remanded by the US Court of Appeals for the Third Circuit so that it could determine, with a valid quorum, the three motions for reconsideration that might have involved invalidly appointed members of the NLRB. In joining the motion for a remand, New Vista sought to avoid a thirty day remand because, *inter alia*, it felt that it would move for the recusal of Member Hirozawa. The Board did not, as it normally does, "accept the remand" and seek input from any of the parties before issuing this most recent ruling. In the ruling, the Board denies, on December 17, 2015, all three motions for reconsideration while noting that the Circuit Court granted the joint motion to remand on December 4, 2015. Respondent did not even know that the Board was considering the matter, or when it got it from the Court of Appeals. New Vista now seeks reconsideration of the order and moves for the recusal of Member Hirozawa.

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The Board's website reflects that Member Hirozawa was part of the charging party's law firm, Gladstein, Reif and McGginis, *for over 20 years*. In April, 2010, the website states, Member Hirozawa became counsel to Board Member Pearce. In 2011, when this case came before the Board for the first time, Member Pearce recused himself from all consideration of it. Presumably, this was because he represented the charging party/petitioning union as a private attorney. However, Member Pearce's law firm was not *actually litigating* this case on behalf of the union. Member Hirozawa's law firm *was*. They litigated this case from its inception in late 2010 and early 2011 until this day. Whatever considerations caused recusal of Member Pearce, including the fact that his current chief counsel, Ellen Dichner, was *also* a partner at the Gladstein firm, should certainly cause the recusal of Member Hirozawa who was 1) chief counsel to Member Pearce when Member Pearce recused himself and 2) a partner in the actual firm litigating this very case. Indeed, Member Hirozawa was a partner in the Gladstein firm until several months before he joined Member Pearce, in 2010, as chief counsel.

Accordingly, the order of December 17, 2015 should be reconsidered, Member Hirozawa recused, and a new decision by a valid quorum issued.

RESPECTFULLY SUBMITTED

/S/ MORRIS TUCHMAN

cc: William Massey, Esq. (By electronic mail)
Linda Dreeban, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2016, I electronically filed the foregoing Status Report of the National Labor Relations Board with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system, and sent to the Clerk of Court, by first-class mail, the required number of paper copies.

I certify that the foregoing Reply was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below.

Louis J. Capozzi, Jr.
Capozzi & Associates
2933 North Front Street
Harrisburg, PA 17110

Morris Tuchman
134 Lexington Avenue
Second Floor
New York, NY 10016

William S. Massey
Gladstein, Reif & Meginniss
817 Broadway
6th Floor
New York, NY 10003

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570
(202) 273-2960

Dated at Washington, D.C.
this 4th day of January 2016